Supreme Court, U.S.
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IN THE UNITED STATES SUPREME COURT

OCTOBER TERM 1998

ELISABETH ANN SCARBOROUGH,

Petitioner,

v.

MARK E. FISCHER,

Respondent.

On Petition for Writ of Certiorari

to the United States Court of Appeals

For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The following questions are presented for review:

1. Does 11 U.S.C. §523(a)(6) mandate nondischargeability of a debt for actual damages arising out of a state court judgment in a malicious prosecution action, where the jury instructions in the state court action allowed a finding in favor of the creditor without a specific finding of intent to injure the creditor?

3. Does 11 U.S.C. §523(a)(6) mandate nondischargeability of a debt for punitive damages awarded in a state court action, where the jury instructions on which the punitive damages award was predicated allowed the jury to assess punitive damages for "reckless" behavior even though the actual damages had to be founded on "intentional" behavior?

PARTIES

The parties to this case are Elisabeth White (formerly known as Elisabeth Scarborough, petitioner; and Mark Fischer, respondent.

Neither party is a corporation. Neither party has parent corporations or any subsidiaries within the meaning of Rule 29.6.

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CITATIONS TO LOWER COURT OPINIONS AND ORDERS

The Eighth Circuit Court of Appeals issued the following opinions and orders in this case:

1. Fischer v. Scarborough, No. 97-3788WMKC, United States Court of Appeals for the Eighth Circuit, 1999 U.S. App. LEXIS 9650, May 18, 1999, Decided, DECISION WITHOUT PUBLISHED OPINION.

2. In re Scarborough, No, 97-3788, United States Court of Appeals for the Eight Circuit, 171 F.3d 638 (8th Cir. 1999), November 19, 1998, Submitted, March 31, 1999, Filed.

3. Elisabeth Ann Scarborough v. Mark E. Fischer, Case No. 97-0284-CV-W-2, U. S. District Court for the Western District of Missouri, Western Division, Order, Unreported.

4. In Re Elisabeth Ann Scarborough; Fischer v. Scarborough, Case No. 96-40735, Adv. No. 96-4097, U.S. Bankruptcy Court, Western District of Missouri, Order, filed 06 January 1997, Unreported.

5. In re Elisabeth Ann Scarborough; Fischer v. Scarborough, Case No. 96-40735, Adv. No. 96-4097, U.S. Bankruptcy Court, Western District of Missouri, Order, filed 28 October 1996, Unreported.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is predicated upon 28 U.S.C. §1254 in that the petitioner seeks review by writ of *certiorari* of a decision of the United States Court of Appeals for the Eighth Circuit.

The Eighth Circuit denied rehearing on 18 May 1999.

The Eighth Circuit's panel decision was entered 31 March 1999.

The United States District Court for the Western District of Missouri affirmed the trial court's decision on 11 September 1997.

The Bankruptcy Court for the Western District of Missouri, Central Division entered its original decision on 28 October 1996 and modified it on 06 January 1997.

STATUTES AT ISSUE

This case involves a construction of 11 U.S.C. §523, and specifically, section 523(a)(6), involving nondischargeability of debts arising out of intentional injury. The statute is set forth in the appendix to this petition.

STATEMENT OF THE CASE

This case arises out of a decision by the U. S. Bankruptcy Court for the Western District of Missouri, Western Division. In the underlying petition for protection through bankruptcy of the debtor and herein petitioner, Elisabeth Scarborough, [1] the respondent Mark Fischer filed an adversary proceeding seeking denial of discharge of a state court judgment in his favor against Scarborough.

In that state court judgment, a Jackson County, Missouri jury awarded Fischer $50,000.00 in actual damages and $100,000.00 in punitive damages on a state law tort of malicious prosecution. An additional $50,000.00 in actual damages were awarded on a second count for the state law tort of abuse of process.

The bankruptcy court granted discharge on the punitive damages and denied discharge on the actual damages. The district court affirmed. A three-judge panel of the Eighth Circuit affirmed in part and reversed in part, holding that neither the actual damages nor the punitive damages were dischargeability.

Scarborough now seeks review of the Eighth Circuit's judgment, as to which rehearing and rehearing *en banc* were both denied.

The state court case in which the judgment sought to be discharged was entered involved an allegation by the parties'

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[1] Elisabeth Scarborough is now legally known by her maiden name of Elisabeth A. White. However, for ease of understanding, she will be

son, Benjamin Fischer, that Fischer had sexually abused him. Scarborough took Fischer to the police department to make a report of the incident. There was an independent investigation by the police, a grand jury indictment, and a pending criminal charge, the last of which was dismissed because the minor child was presumed to be subject to potential emotional scarring from the proceedings.

Scarborough did not request the investigation, and did not testify at the grand jury hearing. Fischer denied the charges. The minor child was not called as a witness in the civil action by Fischer against Scarborough.

Scarborough did not appeal the state court judgment; rather, she sought protection of the bankruptcy courts.

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hereinafter referenced as "Scarborough", as the Eighth Circuit referenced her in their opinion.

ARGUMENT

This case seeks review of an Eighth Circuit decision to deny discharge in bankruptcy to a debtor, Elisabeth Scarborough, whose ex-husband, Mark Fischer, procured a judgment on two state common law torts. Fischer alleged malicious prosecution and abuse of process after a grand jury indictment against him for sodomizing his son was dismissed several years after its issuance; and an Adult Abuse order of protection was dismissed because Scarborough failed to appear because it had been filed in an improper venue. The Eighth Circuits denial of discharge is predicated upon a construction of the applicable statute which contradicts this Court's correlative construction and fails to follow the appropriate legal standards for such review.

The dischargeability of Scarborough's debt to Fischer is governed by 11 U.S.C. §523(a)(6) in that Fischer invoked that statute in attempting to bar discharge of the debt. Fischer's theory was that the debt in question was one for "intentional injury to the person" of Fischer by Scarborough within the meaning of that section, either by application of collateral estoppel or by independent analysis of the facts underlying the judgment.

This issue involves a critical question not yet squarely determined by this Court; and the determination of which at the lower court levels violated this Court's prior rulings.

As indicated, Fischer sought denial of discharge because of a debt arising out of a state court judgment, and both the bankruptcy court and the district court, as well as the Court of Appeals, employed collateral estoppel to Fischer's success.

The state court judgment was predicated upon jury instructions that contain language substantially varying from the "intent to injure" language of section 523. In fact, the instructions clearly contemplate assessment of liability for conduct other than conduct undertaken with an intent to injure the plaintiff, so that the Court of Appeals affirmance of the denial of discharge, and reversal of the grant of discharge, broaden the application of a statute which is intended to be narrowly construed. No prior caselaw of this Court addresses the application of collateral estoppel or the independent denial of discharge under these circumstances. Therefore, the grant of certiorari will clarify an important federal question upon which this Court has not ruled.

Two decisions of this Court were invoked to justify the Court of Appeals actions. The most recent of these is *Kawaauhau, et vir., v. Geiger*, 523 U.S. 57, 140 L.Ed.2d 90 (1998). In *Geiger*, the Court considered whether a debt arising from a medical malpractice judgment attributable to negligent or reckless conduct was dischargeable in bankruptcy under 11 U.S.C. §523(a)(6). In so considering, the Court noted that "[the] word 'willful' in (a)(6) modifies the word 'injury'." *Id.* at 96. The Court continued: "Intentional torts generally require that the actor intend 'the consequences of his act', not simply 'the act itself'". *Ibid.*

Hence, in *Geiger*, because the judgment was predicated upon a theory of negligence, the debt could be discharged. There was no question but that the jury did not find that the physician had intended the injury of which the plaintiff had

complained. No intent to injure the plaintiff was *pleaded* in the underlying case, and intent to injure the plaintiff in the manner of which the plaintiff complained was not an element of the plaintiff's case.

The *Geiger* Court reflected upon *McIntyre v. Kavanaugh*, 242 U.S. 138, 61 L.Ed. 205 (1916), and *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 79 L.Ed. 393 (1934). In the former case, "a broker 'deprived another of his property forever by deliberately disposing of it without semblance of authority", and was denied discharge. *Geiger, supra,* 140 L.Ed.2d at 97. In the latter case, the Court held that "not every tort judgment for conversion is exempt from discharge", and "negligent or reckless acts....do not suffice to establish" grounds for denial of discharge. *Ibid.*

In the case at hand, nothing about the jury's instructions advises a subsequent court that an "intent to injure the person" of the judgment creditor was found by the jury. In fact, Scarborough was found liable on instructions that did not require the jury to identify the intent of Scarborough in acting, only what the intent *was not*, that is, "proper". Nonetheless, the Court of Appeals found the instruction to be parallel to the statutory definition of conduct that justifies nondischargeability. Hence, the Court of Appeals' opinion raises the issue of whether an "improper purpose", without reference to the judgment creditor who seeks nondischargeability, is "intent to injure" that judgment creditor for purposes of identity of issues needed for invocation of collateral estoppel.

Scarborough maintains that, whether judged merely on the jury's verdict as explained by the instructions; or independently reviewed on the record of the state court proceeding; her conduct does not fit within the definition of "intent to cause injure" which this Court, and the Courts of Appeals, have applied to determine whether discharge is exempted. Without direction from this Court, trial courts attempting to apply collateral estoppel in cases where there is a lack of parallelism between the jury instructions in the predicate judgment and the language of section 523(a)(6) will be left to randomly decide if the issue of "intent to injure" the person of the judgment creditor was an element of the underlying judgment.

Therefore, re-examination of this Court's statutory construction of 11 U.S.C. section 523(a)(6) definition is appropriate, warranting acceptance of this case for review.

The Court of Appeals applied collateral estoppel to determine that the issues to be considered on a petition for denial of discharge had been litigated in the state court proceeding. However, the formulation of those issues as reflected in the jury instructions and Missouri law interpreting the elements of the causes of action, suggest that the "intent to injure the person" required for denial of discharge is not presumptively part of the state court jury findings.

Therefore, even assuming *arguendo* that collateral estoppel applies, it should not have barred discharged. The Court of Appeals could not have denied discharge without drawing inferences from the facts of the underlying state court case; in so doing, it unfairly and unevenly applied the doctrine of collateral

estoppel to expand the implications of the jury verdict and allow for the denial of discharge.

The jury instructions upon which the judgment was predicated appear in the appendix to this writ. They are three: The verdict director for malicious prosecution; the verdict director for abuse of process; and the verdict director for punitive damages.

Instruction No. 9, the malicious prosecution instruction directs the jury to find for Fischer if they believed that "[Scarborough] instigated a proceeding against [Fischer] which terminated in favor of [Fischer]" and that she did so "primarily for a purpose other than that of bringing an offender to justice and acted without reasonable grounds". Notably, no purpose was specified; the jury was free to find in favor of Fischer regardless of what purpose it might have believed prompted Scarborough's behavior, as long as it was some purpose other than bringing Fischer to justice.

Similarly, Instruction No. 13 instructed the jury to find for Fischer if it believed that "[Scarborough] had an improper purpose in exercising [an] illegal, improper or perverted use of process". The jury was not restricted to a particular purpose. *Any* improper purpose presumably would suffice.

Finally, punitive damages could be assessed, according to Instruction No. 7, if the defendant's conduct was "outrageous" because of "evil motive or reckless indifference to the rights of others". No particular motive had to be found as long as it was "evil", and such a finding was not required -- in the alternative,

a finding of "reckless indifference" to the rights of unspecified others was sufficient for a grant of punitive damages.

From these instructions, the Court of Appeals found that "as a matter of law, ...the state court judgment in favor of Fischer on the malicious prosecution claim necessarily included a finding that Scarborough willfully and maliciously sought to injure *Fischer*. In so holding, the Court of Appeals did not take into consideration any Missouri caselaw construing the tort of malicious prosecution.

Had it done so, it would have seen the case of *Proctor v. Stevens Employment Services*, 712 S.W.2d 684 (Mo. *banc* 1992). In *Proctor*, Missouri's Supreme Court held that "[i]n a malicious prosecution case, a plaintiff must show "malice in law", which is founded upon a legal presumption *independent of any proof regarding the defendant's mental state*. *Proctor*, 712 S.W.2d at 686 - 687.

By comparison, under section 523(a)(6), a denial of discharge can *only* be predicated upon a showing that the debtor "intended to injure" the judgment creditor. The Eighth Circuit Court of Appeals acknowledged this requirement, and cited its own holding to that effect in *In re Long*, 774 F.2d 875, 881 (8th Cir. 1985). Hence, the state court jury verdict did *not* require a showing of specific intent to *injure* the judgment creditor. Only by *inferring* that if the jury found in Fischer's favor, the jury presumably believed Scarborough *intended to injure Fischer* could discharge be denied.

Under Missouri law, collateral estoppel does not contemplate presumptions about the judgment that is being

invoked to bar further litigation. Rather, Missouri requires that "the issues in the present case and the prior adjudication *must be identical*". *State v. Nunley*, 923 S.W.2d 911, 922 (Mo. *banc 1996)(italics supplied)*. The Court of Appeals expanded the denial of discharge provision of section 523 to encompass conduct that is not specifically directed to intentional injury of the judgment creditor, but limited instead to an "improper intention" or an "improper purpose".

This expansion of the provisions of section 523 through broad interpretation of the doctrines of collateral estoppel and the findings of a state court judgment signals an improper erosion of the strict mandates of the bankruptcy code, and a threatening of the Congressional endorsement of a "fresh start" approach to bankruptcy. Absent an interpretation by this Court to the contrary, the lower courts can use the Eighth Circuit's opinion in *Scarborough* as a justification for an unrestrictive application of collateral estoppel to broaden the denial of discharge provisions of section 523.

The Court of Appeals' application of the collateral estoppel doctrine to bar litigation of the issue of intent to injure Fischer shows the extent to which the appellate court tortured this Court's interpretation of Congressional intent to bar discharge for certain narrowly proscribed debts. The Court of Appeals said that intent to injure could be found in the state court judgment because

> The criminal charges and protective order were clearly aimed at Fischer as the defendant in the criminal charges and as the object of the protective order. Similarly, they were certain to

> cause Fischer harm by preventing him from seeing his son and by exposing him to possible criminal sanctions of imprisonment, fines, and a criminal record as a sex offender.

Court of Appeals' decision at 7. However, the state court jury entered no such findings, and it is unclear from whence came this determination. Only by *presuming* the effect of Scarborough's actions, *or by examining the record of the state court action* could a reviewing court have reached the conclusion that taking Benjamin Fischer to the police to make a statement about his father's sodomization of him and seeking a protective order to prevent further sodomization would have the noted effects. Moreover, the Court of Appeals had to reach a conclusion about facts in evidence in the state court action, rather than merely examining the jury instructions and the actual findings of the jury and the judgment thereon entered. The state court judgment did not result in the generation of special findings by the jury. There was no determination that Fischer even *saw* his son at the time of the police report -- hence, no determination that such visitation would stop. There was no determination that the charges against Fischer could have, would have, or did result in exposing Fischer to specific injuries -- and certainly no determination that Scarborough knew of such potential injuries and acted with the intent to occasion them. In fact, the malicious prosecution charge *required no finding of mental state whatsoever*.

In applying the collateral estoppel doctrine, then, the Eighth Circuit looked at some, but not all, of the record underlying the

jury verdict. Accordingly, its application of "collateral estoppel" to bar relitigation is inconsistent with this Court's prior holdings, even those upon which the Eighth Circuit relied.

In *Montana v. U.S.*, 440 U.S. 147 (1979), this court refused to allow examination of "fact[s], question[s] or rights[s]" previously litigated" in the prior judgment. But the Eighth Circuit had to resort to scrutiny of the evidence in the original state court action to reach its definition (erroneous though it was) of the terms used by the jury in reaching the prior judgment. In so doing, the Eighth Circuit violated this Court's mandate that such scrutiny was barred.

To compound its error, the Eighth Circuit examined only part of the record, the record reflecting the injury that Fischer claimed to have suffered -- but did not examine evidence of Scarborough's intent. Because the jury could have found in Fischer's favor on the issue of malice without a finding of mental state, and without reference to what injury might have (or might not have) been intended by Scarborough, the Eighth Circuit could not reach its conclusion that the section 523(a)(6) criteria for denial of discharged had been met through the application of collateral estoppel as mandated by this Court. Rather, the Eighth Circuit had to rely on an examination of presumed facts, or facts referenced by Fischer in pleadings filed in the adversary proceeding.

Therefore, the Eighth Circuit's judgment impermissibly expands the doctrine of collateral estoppel both under Missouri state law, and the decisions of this Court. Hence, review of this case is necessary to clarify the manner in which a prior

judgment is examined in applying collateral estoppel to determine what issues can be raised in subsequent proceedings ostensibly involving related or identical transactions.

The Court of Appeals' misunderstanding of the doctrine of collateral estoppel as defined under Missouri law and the law of this Court repeats itself in its interpretation of the jury verdict for Fischer on the abuse of process count.

The Court of Appeals summarized the provisions of section 523(a)(6) as follows:

> As stated above, acting with a purpose is synonymous with acting willfully. Again, "maliciously" required that Scarborough's actions were certain or almost certain to cause Fischer harm.

Appellate decision at 7. But then the court bypassed the state court jury instructions to hold that the act of seeking a protective order "were certain to cause Fischer harm in the same ways under the abuse of process claim as under the malicious prosecution claim". *Id.* at 8.

Neither those harms, nor the potential for their resulting from Scarborough's conduct, were part of the jury's findings. The origins of the Eighth Circuits' conclusions regarding those harms, the likelihood of their occurrence, and of Scarborough's knowledge of that likelihood and those harms along with her intent that they occur, are unknown. These were all apparently inferred by the Eighth Circuit from the jury verdict, the jury instructions, or some other part of the record before it either arising out of the bankruptcy proceedings or the underlying state action.

No part of this Court's mandate regarding the application of collateral estoppel allows the reviewing court to examine testimony, accounts of testimony, pleadings summarizing testimony or any other material to aid in its understanding of the judgment pursuant to which collateral estoppel is invoked. Yet, given the absence of any such findings in the jury's verdict, or the requirement of such findings in the abuse of process instructions, the court of appeals had no choice but to *look behind the state court judgment in its interpretation of that judgment.*. Given this obvious violation of the method of assessing collateral estoppel prescribed by the Missouri courts and this Court, the Eighth Circuit's decision must undergo this Court's examination to prevent a future perversion of the collateral estoppel doctrine, whether by application of state law in the federal realm, or in federal question cases applying the law of this Court.[2]

The grant of certiorari to review the appellate court's decision with respect to the dischargeability of the actual damages award is further bolstered by the fatal flaws in the related denial of discharge as to the punitive damages award. Both the district court and the bankruptcy court correctly perceived that the jury's verdict in favor of Fischer for punitive damages could have been because it perceived Scarborough's conduct as "reckless". Damages were only awarded on the

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[2] This basis for invoking Supreme Court jurisdiction assumes, *arguendo* that collateral estoppel was properly invoked; should survive the modern evolution of the law; or is viable in today's legal climate. It is the opinion of the author that the answer to all three questions is a resounding "no"; but whether this doctrine should be abandoned is not necessarily at issue in the case at bar.

malicious prosecution count, which under Missouri law did not require an examination of, or finding with respect to, Scarborough's mental state. *Proctor, supra,* 712 S.W.2d at 686 - 687.

Notwithstanding that limitation of the jury award for actual damages for malicious prosecution, the Eighth Circuit rested its denial of discharge (and resultant reversal of the two lower court judgments) as to the punitive damages award on its nondischarge of the actual damages judgment. The court said:

> We hold that where the compensatory and punitive damage awards are based on the same underlying conduct, and the judgment for compensatory damages is nondischargeable because it is based on willful and malicious injury to another, then the punitive damages award is likewise nondischargeable.

Court of Appeals opinion at 9.

This Court, in discussing what debts may be legitimately denied discharge under section 523(a)(6), does not permit such a limited analysis. Although *Grogan v. Garner,* 498 U.S. 279, 112 L.Ed. 2d 755, 111 S.Ct. 654, 745 (1991) does allow denial of discharge for actual and punitive damages arising out of the same act, this Court's conclusion in that case followed an analysis of the evidence before the judgment jury in assessing the damages and an independent conclusion as to the mental state of the debtor. *See, e.g., Grogan, supra* at 744. In the case at bar, the appellate court had to ignore the state law clearly defining the malicious prosecution count as being unrelated to a defendant's mental state.

If the punitive damages at issue in the present case arose out of Scarborough's conduct resulting in actual damages, then it arose out of conduct that no jury has decided was intended to cause *Fischer* harm. The appellate court departed from this Court's established precedent in otherwise finding, and so its decision should be scrutinized by a grant of certiorari to review, clarify, and announce guidelines for the criteria to be applied in granting or denying discharge under section 523(a)(6) of the United States Bankruptcy Code.

Moreover, the result reached by the Eighth Circuit by its clumsy application of the collateral estoppel doctrine is presumed by the Eighth Circuit to carry more validity because it purports to bring the Eighth Circuit in line with other circuits by denying discharge for punitive damages if such acts are "willful and malicious" without regard to the character of the damages. The Eighth Circuit sites such cases as *Moraes v. Adams, (In re Adams),* 761 F.2d 1422, 1428 (9th Cir. 1985) (holding that the applicability of §523(a)(6) is determined by the nature of the act and applies to all liabilities therefrom).

However, in this case, the jury was not required to find intent to injure Fischer in order to find that Scarborough's actions were malicious; and was not required to find intent at all to award punitive damages. Hence, the court of appeals' error in applying this Court's collateral estoppel standards, and those of the Missouri state courts, lead to a failure to properly scrutinize the grant of discharge on the punitive damages award, and the application of an incorrect legal standard.

The Bankruptcy Court engaged in the same type of haphazard application of principles of law that destroy the validity of the Eighth Circuit's reasoning and render its delineation of the applicable legal standards and application thereof subject to reversal on review. In attempting to determine if the jury instructions "necessarily included" a finding of intent by Scarborough to injure Fischer, the Bankruptcy Court stated:

> In a drunk driving case, unless the plaintiff can show that the defendant purposely crashed into him, the plaintiff cannot show that the defendant intended to harm him. The drunk driver, while he may consider the possibility that his condition may impair his ability to drive and result in an accident, he generally does not intend to wind up in an accident and injure someone. More likely, even if he appreciates the effect his alcohol consumption has on his ability to drive, he generally is hoping he makes it home without incident.

Bankruptcy Court Opinion on Rehearing, at 9.

The Bankruptcy Court did not confine itself to conclusions about the world at large. Indeed, it made significant assumptions about Scarborough in specific:

> In contrast, Scarborough's allegations against Fischer *appear to have been calculated* to result in his losing visitation, incurring attorney's fees, being subject to criminal prosecution, and experiencing significant distress, and again, this Court believes the jury so found.

Bankruptcy Court Opinion on Rehearing at 11. The Bankruptcy Court could only have reached these conclusions by some reference to the record, and hence overstepped even the use of collateral estoppel to enforce its own beliefs, rather than those of the jury, whatever such beliefs might have been.

Hence, that court, like the court of appeals, applied extraneous matter -- in this case, its own presumptions -- to interpret the jury instructions. Like the court of appeals, the Bankruptcy Court could not deny discharge by complete refusal to look behind the judgment. Rather, it had to selectively examine the judgment to explain its denial of discharge. *Ibid,* delineating the effects of Scarborough's actions by reference to the record in the state court proceedings.

Without exception, the Eighth Circuit's holdings and those of the court which it affirmed in part and reversed in part in the case at bar warrant review. Therefore, grant of this petition is appropriate.

CONCLUSION

For the foregoing reasons, this Court should grant *certiorari* to examine the standards applied in an proceeding to deny discharge under section 523(a)(6), the propriety of applying the collateral estoppel doctrine in such a proceeding, the manner and method of such application, if it is indeed appropriate at all; and the extent to which a federal court can or should look behind the judgment representing the debt sought to be discharged in order to determine if the debt arises from conduct that Congress sought to punish by creating the 523(a)(6) exception to discharge.

Respectfully submitted:

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APPENDIX

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-3788
No. 97-3789

In re Elisabeth Scarborough, *
Debtor. *

Mark E. Fischer, *
Appellee/Cross-Appellant *
*
v. *
Elisabeth Scarborough, *
Appellant/Cross-Appellee *

Appeal from the United States District Court for the Western District of Missouri.

Submitted: November 19, 1998
Filed: March 31, 1999

Before MCMILLIAN, WOLLMAN, and HANSEN, Circuit Judges

HANSEN, Circuit Judge.

Mark E. Fischer filed an adversary complaint in Elisabeth Scarborough's Chapter 7 bankruptcy proceeding, seeking to bar the discharge of a judgment debt he had obtained against Ms. Scarborough. Applying the collateral estoppel doctrine, the

bankruptcy court ruled that the actual damages portion of the judgment was not dischargeable under 11 U.S.C. §523(a)(6) (1994), but that the punitive damages portion was dischargeable. Ms. Scarborough appealed the nondischargeability of the actual damages and Mr. Fischer cross-appealed the dischargeability of the punitive damages to the district court, which affirmed the bankruptcy court. Ms. Scarborough and Mr. Fischer now bring the same appeal and cross-appeal from the district court's ruling. We affirm in part and reverse in part.

I.

Fischer and Scarborough were married in 1984 and divorced in 1986. Pursuant to the divorce decree, Ms. Scarborough had custody of their only son, Benjamin, and Mr. Fischer was allowed visitation. In 1989, Ms Scarborough took Benjamin to the Grain Valley, Missouri, Police station where Benjamin told police that his father, Fischer, sodomized him when he was three. A police investigation followed and a grand jury indicted Fischer on felony child abuse charges. The criminal charges were eventually dismissed two years later. Ms. Scarborough also filed a petition for an ex parte order of protection in 1989 that was dismissed when she failed to appear at the hearing.

In 1991 Mr. Fischer filed a civil lawsuit against Ms. Scarborough in Missouri state court, alleging malicious prosecution and abuse of process. The jury returned a verdict in favor of Fischer, awarding him $50,000 in actual damages and

$100,000 in punitive damages in the malicious prosecution claim and $50,000 in actual damages on the abuse of process claim. Ms. Scarborough did not appeal the state verdict.

Ms. Scarborough failed to pay the judgment and filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code in 1996, seeking to discharge the judgment owed to Fischer. Mr. Fischer sought to bar the discharge under §523(a)(6), which excepts from discharge any debt "for willful and malicious injury by the debtor to another entity or the property of another entity." The bankruptcy court determined that the jury in the state case necessarily found that Ms. Scarborough acted willfully and maliciously to injure Fischer based on the jury instructions for the underlying malicious prosecution and abuse of process claims. However, the bankruptcy court determined that Ms. Scarborough had not willfully and maliciously injured Fischer as to the punitive damages, and thus, that portion of the judgment debt was dischargeable. The bankruptcy court relief on its earlier case, In re Ratcliff, 199 B.R. 185 (Bankr. W. D. Mo. 1996), and the jury instructions that allowed the jury to award the punitive damages based on reckless indifference. The district court affirmed the bankruptcy court's decision primarily for the reasons stated by the bankruptcy court.

II.

In this appeal, we sit as a second court of review and apply the same standards as applied by the district court. See United

States v. Roso (In re Roso), 76 F.3d 179 , 181 (8th Cir. 1996). We review de novo the district court's conclusions of law, which include the application of collateral estoppel. See Tudor Oaks Ltd. Partnership v. Cochrane (In re Cochrane), 124 F.3d 978, 982 (8th Cir. 1997) cert denied, 188 S. Ct. 1044 (1988).

Section 523(a)(6) provides that certain debts are not dischargeable in bankruptcy, namely those that are "for willful and malicious injury by the debtor to another entity." Willful and malicious are two distinct requirements that Fischer, as the party seeking to avoid the discharge of the debt, must prove by the preponderance of the evidence before the § 523(a)(6) exception to discharge applies. See Grogan v. Garner, 498 U.S. 279, 286 - 87 (1991 (holding that the preponderance of the evidence standard applies to §523 claims); Johnson v. Miera (In re Miera), 926 F.2d 741, 743 (8th Cir. 1991)(noting that willful and malicious are distinct elements of the §523(a)(6) exception). Willfulness is defined as "'headstrong and knowing' conduct and 'malicious' as conduct targeted at the creditor....at least in the sense that the conduct is certain or almost certain to cause....harm.'" In re Miera, 926 F. 2d at 743 - 44 (quoting Barclays Am./Bus. Credit, Inc. v. Long (In re Long), 774 F. 2d 875, 881 (8th Cir. 1985)). To give effect to the distinction between "malicious" and "willful", we have held that malice requires more than just reckless behavior by the debtor. Id. at 743. Scarborough must have acted with the intent to harm Fischer rather than merely acting intentionally in a way that

resulted in harm. See Kawaauhau v. Geiger, 118 S. Ct. 974, 977 (1998).

Collateral estoppel is a legal doctrine that "bar[s] relitigation of factual or legal issues that were determined in a prior....court action," and applies to bar relitigation in federal court of issues previously determined in state court. In re Miera, 926 F. 3d at 743. We look to the substantive law of the forum state in applying the collateral estoppel doctrine, giving a state court judgment preclusive effect if a court in that state would do so. See Baker Elec. Coop., Inc. v. Chaske, 28 F.3d 1466, 1475 (8th Cir. 1994). Missouri courts consider four factors in applying collateral estoppel: (1) the issues in the present case and the prior adjudication must be identical; (2) the judgment in the prior adjudication must be on the merits; (3) "the party against whom collateral estoppel [is] asserted must have been the same party or in privity with a party in the prior adjudication," and (4) "the party against whom collateral estoppel is asserted [must] have [had] a full and fair opportunity to litigate the issue in the prior suit." State v. Nunley, 923 S.W.2d 911, 922 (Mo. 1996)(internal quotations and citations omitted), cert denied, 519 U.S. 1094 (1997); see also Nichols v. City of St. Louis, 137 F.2d 833, 835 (8th Cir. 1988)(applying Missouri law). Additionally, "[t]he doctrine applies only to those issues that were necessarily and unambiguously decided." Nunley, 923 S.W.2d at 922.

A. Actual Damages

There is no dispute that the state court judgment is a valid and final judgment or that the determinations required by the jury instructions were essential to that judgment. It is also undisputed that the state court judgments were reached on a preponderance of the evidence standard, which is the same standard that applies to §523(a)(6) dischargeability disputes under Grogan. See 498 U.S. 286 - 87. The controversy concerns whether the issues were the same and whether Scarborough had a full and fair opportunity to litigate them.

Though Scarborough argues that legal mistakes were made in the state court trial, she did not appeal the state court judgment. "Whether a prior judgment is legally correct is not at issue in applying the doctrine of collateral estoppel." Buckley v. Buckley, 889 S.W.2d 175, 179 (Mo. Ct. App. 1994). See also Montana v. United States, 440 U.S. 147, 162 (1979)("[A] fact, question or right distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached by an erroneous application of the law.")(internal quotations and citations omitted)(emphasis in original); Richey v. United States Internal Revenue Serv., 9 F.3d 1407, 1412 (9th Cir. 1993)(relying on Montana and holding that even if the erroneous jury instruction in the previous case effectively directed a verdict against the defendant, it was still only a misapplication of the law and irrelevant to the issue of the prior judgment's preclusive effect for purposes of collateral estoppel). Scarborough is "attempting to achieve through the back door what [she] cannot do directly:

that is, bring a subsequent action challenging a legal ruling in a prior action." SilFlo, Inc. v. SFHC, Inc., 917 F. 2d 1507, 1521 (10th Cir. 1990). The purposes of collateral estoppel are to relief parties of "the expense and vexation attending multiple lawsuits, conserve[] judicial resources, and foster [] reliance on judicial action by minimizing the possibility of inconsistent decisions." Montana, 440 U.S. at 153, 154 (footnote omitted). To allow Scarborough to attack the state court judgment would eviscerate the doctrine of collateral estoppel. She had her chance to challenge the state court jury's decision by appealing the state appellate court and declined to do so.

We must now decide whether the issues sought to be precluded from relitigation--whether Scarborough willfully and maliciously injured Fischer--are identical to the issues decided in the state trial. The bankruptcy court looked at the state trial proceedings, particularly the jury instructions, to determine whether the issues of "willfulness": and "maliciousness" were litigated in that case. Jury Instruction No. 9 for malicious prosecution read: "Your verdict must be for [Fischer] if you belief: First, [Scarborough] instigated a judicial proceeding against [Fischer which terminated in favor of [Fischer] ...." (Appellee's App. at 149.) Instruction No. 10 further defined "instigated" to "mean[] that [Scarborough] stimulated, promoted or encouraged the specific action taken." (Id. at 150). The malicious prosecution instruction required the jury to also find that "in so doing [Scarborough] acted primarily for a purpose other than that of bring [Fischer] to justice and acted without

reasonable grounds." (Id. at 19). "Reasonable grounds" was further defined in Instruction 11 to "mean[] the existence of facts which would warrant an ordinarily cautious and prudent person in believing plaintiff Mark Fischer was guilty of the offense charged." (Id. at 1512.) Finally, the jury was required to find that Fischer was damaged before holding Scarborough liable for malicious prosecution. (Id. at 150).

Thus, when the jury held Scarborough liable for malicious prosecution, it necessarily found that Scarborough stimulated, promoted or encouraged the criminal charges and the petition for a protective order that were brought against Fischer (and later dismissed); that she instigated the charges and the petition for a "purpose" other than brining Fischer to justice; and that she did so under circumstances such that a reasonably prudent person would not believe that Fischer was guilty of sodomizing his son. In distinguishing reckless behavior from willful behavior for purposes of § 523(a)(6), Congress defined willful as "deliberate" or "intentional". See In re Miera, 926 F.3d at 744 (discussing legislative history of §523(a)(6)). The terms describing "instigated" are clearly willful acts. To act with a purpose also clearly requires a willful act. Cf. [sic] third New Int'l Dictionary 1847 (1986)(defining "purpose" as "something that one sets before himself as an object to be attained; an end or aim to be kept in view.") We conclude that the jury's findings that Scarborough "instigated" the actions and "acted .... with a purpose" necessarily required a finding that Scarborough acted willfully.

Before §523(a)(6) applies to exempt the judgment from discharge, Scarborough's actions must also have been malicious, or targeted at Fischer, so that Scarborough was "certain or almost certain to cause [Fischer] ....harm." In re Miera, 926 Fi3d at 743 - 44. The criminal charges and protective order were clearly aimed at Fischer as the defendant in the criminal charges and as the object of the protective order. Similarly, they were certain to cause Fischer harm by preventing him from seeing his son and by exposing him to possible criminal sanctions of imprisonment, fines, and a criminal record as a sex offender. Thus, as a matter of law, we conclude that the state judgment in favor of Fischer on the malicious prosecution claim necessarily included a finding that Scarborough willfully and maliciously sought to injure Fischer. Cf. Wilson v. Schoor (In re Schoor), 139 B.R. 466, 468 (W.D. Mo. 1992)(finding issues litigated in a malicious prosecution case to be the same issues involved in a subsequent §523(a)(6) dischargeability suit). The state court judgment collaterally estopped the relitigation of that issue in Fischer's adversary proceeding concerning the malicious prosecution judgment debt.

The jury instruction for abuse of process required the jury to find that "[f]irst, [Scarborough] made an illegal, improper, perverted use of process that was neither warranted nor authorized by the process, and [s]econd, [Scarborough] had an improper purpose in exercising such illegal, improper or perverted use of process, and [t]hird, [Fischer] was thereby damaged." (Appellee's App. at 154). Thus, the jury found that

Scarborough had an "improper purpose" that was "neither warranted nor authorized" when she instigated (according to the jury) the criminal charges and sought the protective order against Fischer. As stated above, acting with a purpose is synonymous with acting willfully. Again, "maliciously" requires that Scarborough's actions were certain or almost certain to cause Fischer harm.

The criminal charges and protective order were certain to cause Fischer harm in the same ways under the abuse of process claim as under the malicious prosecution claim. Thus, as a matter of law, we hold that the issue of whether Scarborough acted willfully and maliciously in abusing judicial process was necessarily decided in the state case. The bankruptcy court correctly found that this matter could not be relitigated in the bankruptcy proceeding pursuant to the collateral estoppel doctrine.

B. Punitive Damages

Fischer received punitive damages only on the malicious prosecution claim. The bankruptcy court found, and the district court agreed, that the issue of punitive damages in the state trial did not involve the same issue of willful and malicious action addressed in the bankruptcy proceeding because the jury instruction for punitive damages in the state case allowed a punitive damages award if Scarborough acted only recklessly. The punitive damages instruction read:

> If you find the issues in favor of [Fischer], and if you believe the conduct of [Scarborough] as submitted in either Instruction Number 9 or Instruction Number 13 was outrageous because of defendant's evil motive or reckless indifference to the rights of others, then in addition to any damages to which you find [Fischer] entitled under either Instruction Number 9 or Number 13, you may award [Fischer] an additional amount as punitive damages in such sum as you believe will serve to punish Scarborough] and to deter [Scarborough] and others from like conduct.

(See Appellee's App. at 147.)

We believe the bankruptcy court was misled by these instructions. The jury reached the issue of punitive damages only after it first found that Fischer was entitled to damages on the underlying claims. Thus, before the jury awarded punitive damages based on malicious prosecution, it first had to find that Fischer met his burden of proving liability for the underlying malicious prosecution claim. As we have already discussed, in finding in favor of Fischer on the malicious prosecution claim, the jury necessarily found that Scarborough acted willfully and maliciously to injure Fischer. The actual and punitive damages were based on the same conduct. We need not look at the state's standard for awarding punitive damages because the jury already found that Scarborough's conduct in the underlying malicious prosecution claim, for which the punitive damages were also awarded, was willful and malicious. See In re Miera, 926 F.2d at 745 (holding that punitive damages, which are based on the same underlying action justifying

nondischargeability of compensatory damages, are likewise nondischareable); see also Schoor, 139 B.R. at 468 (applying In re Miera and holding punitive damages nondischargeable where actual damages were nondischargeable without looking at specific jury instructions for punitive damages). We hold that where the compensatory and punitive damage awards are based on the same underlying conduct, and the judgment for compensatory damages is nondischargeable because it is based on willful and malicious injury to another, then the punitive damages award is likewise nondischargeable.

The district court reluctantly distinguished In re Miera, noting that the jury instructions in the underlying case in In re Miera allowed an award of punitive damages if the debtor's acts were based on "willful indifference" to the rights of the plaintiff. Thus, in In re Miera, punitive damages were awarded only if the conduct was willful. Under the instructions in this case, the punitive damages could have been awarded if Scarborough merely acted with reckless indifference to others. We need not distinguish In re Miera in the same manner as the district court did, however, because, as noted above, the willful and malicious conduct underlying the actual damages and the punitive damages is the same. The jury in the state case found that Scarborough willfully and maliciously injured Fischer by instigating the criminal charges and the petition for a protective order. Scarborough's willful and malicious conduct resulted in the actual damages and, with the jury's finding of outrageousness, supported the punitive damages. Because the

holding in In re Ratcliff, 199 B.R. 185 (Bankr. W.D. Mo. 1996), the decision relied on by the bankruptcy court in this case, differs from our opinion, we decline to follow it.

Finally, we note that our holding today regarding the dischargeability of punitive damages is consistent with our sister Circuits. See Abbo v. Rossi, McCreery & Assocs., Inc. (In re Abbo), NO. 97-4482, 1999 W.L. 95060 at *2 (6th Cir. Feb 25, 1999)(holding punitive damages nondischargeable under section 523(a)(6) when such damages are based on the same conduct as the underlying judgment); Hagan v. McNallen (In re McNallen), 62 F.3d 619, 626 - 627 (4th Cir. 1995)(same; collecting cases); Moraes v. Adams, (In re Adams), 761 F.2d 1422, 1428 (9th Cir. 1985) (holding that the applicability of §523(a)(6) is determined by the nature of the act and applies to all liabilities therefrom).

III.

For the foregoing reasons, we affirm the district court's judgment on the nondischargeability of the $100,000 in actual damages and reverse the district court's judgment on the dischargeability of the $100,000 in punitive damages.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF MISSOURI

IN RE:	**)Case No. 96-40735**
ELISABETH ANN SCARBOROUGH,)	
Debtor.	**)**
Mark E. Fischer,	**)**
Plaintiff,	**)Adv.No. 96-4097**
v.	**)**
ELISABETH ANN SCARBOROUGH)	
Defendant.	**)**

ORDER

Debtor Elisabeth Ann Scarborough has filed a motion with this Court in which she requests a new trial, amendment of judgment, and amendment of this Court's findings, on a judgment this Court entered in the above-entitled adversary on October 28, 1996. This adversary involved the complaint filed by Mark E. Fischer in which he sought a determination by this Court that a judgment he obtained against the debtor, his ex-wife, for malicious prosecution, abuse of process, and punitive damages based on Scarborough's initiation of proceedings alleging Fischer had sexually molested the parties' minor child, be declared nondischargeable under 11 U.S.C. §523(a)(6).

In the October 28 1996 order, this Court found in favor of Fischer, holding that the state court judgment constituted a judgment for a willful and malicious injury to Fischer and was therefore nondischargeable under §523(a)(6). This Court further found that because the jury's verdicts included within them a finding of willful and malicious injury, those issues were barred by the doctrine of collateral estoppel and did not need to be retried here.

Scarborough requests that this Court reconsider that previous decision. In particular, she seeks a new trial on the issue of "willful and malicious" because she disagrees with this Court's finding that those issues were barred by the doctrine of collateral estoppel due to the finding that the jury verdicts in favor of Fischer included those findings within them. In lieu of that, she asks the Court to amend its findings and/or make additional findings. This Court conducted a hearing on Scarborough's motion on December 05th, heard the arguments and statements of counsel, and took the matter under advisement.

Scarborough asserts that the Court incorrectly applied the law of the Eighth Circuit in determining whether the jury instructions encompassed a finding of "willful injury" as required under §523(a)(6). Regarding the malicious prosecution verdict, she contends:

> The Court's decision relies on the language that the defendant "acted primarily for a purpose

> other than that of bringing an offender to justice" not only to satisfy the malice requirement, but also eliminates any separate meaning to the word "willful" by concluding that the instruction automatically satisfies the "willful" requirement.

She states that in so ruling, this order directly conflicts with the rule that a reckless disregard standard is not sufficient to satisfy the willfulness standard under section 523(a)(6), and that rather than narrowly construing the exceptions to discharge, In re Belfrey, 862 F.2d 661, 662 (8th Cir. 1988), this Court gave an improperly broad interpretation to §523(a)(6).

while this Court agrees that recklessness will not satisfy the willfulness standard under section 523(a)(6)[n 1], the Court disagrees with Scarborough's statement that the jury instructions could include a finding that she was merely reckless and her statement that the court concluded in the October 28 order that the malicious prosecution instruction "automatically" satisfied the willful requirement.

In the October 28 order, this Court repeated the rule of law that under section 523(a)(6), the willfulness requirement is separate from the malice requirement and that "willful" means "intentionally or deliberately". Contrary to concluding the instruction automatically satisfied the willfulness requirement, this Court analyzed the jury instructions and found that they contained two elements which involved a finding "willful". First, the malicious prosecution jury instruction required that Scarborough have "instigated" the action against Fischer. As

the Court said before, the term "instigate" in itself carries a strong connotation of willfulness or deliberateness, but to elaborate on this point further, Instruction No. 10 specifically defined "instigate" as follows:

> The term "instigated" as used in these instructions means that the defendant stimulated, promoted or encouraged the specific act taken.

The Court believes all of these descriptive words ("stimulated," "promoted," and "encouraged") further connote intentional or deliberate action.

More importantly, however, this Court also found (and still finds) that by finding Scarborough "acted primarily for a purpose" [n2] and that she "had an improper purpose" [n3], the jury necessarily found that she acted "willfully," or "intentionally or deliberately". The Court remains satisfied with this conclusion, but again to elaborate, Webster's defines purpose as follows:

> 1. The object toward which one strives or for which something exists: GOAL. 2. A desired or intended result or effect. 3. Determination : resolution. 4. The matter at hand. ---vt. -posed, posing, poses. To resolve or intend to accomplish or perform. --on purpose. willfully: deliberately.

Webster's II New Riverside University Dictionary 956 (3d ed. 1994). Certainly, this definition embraces "willfulness" and in fact, the words "intended," "willfully", and "deliberately" are all

specifically included in the definition. Under this definition (which encompasses the common understanding of the word), the a person acts with a purpose, she is acting in a particular manner so as to achieve a desired or intended result. Thus, by finding Scarborough "acted primarily for a purpose" and that she "had an improper purpose," the jury found she acted in particular manner so as to achieve a desired result. Hence, it found she acted willfully. The question, then, is what was her desired result?

Scarborough concedes that she acted willfully when she initiated the ex parte proceedings and reported the abuse to the police, but she contends that this is not enough to fully satisfy the willful and malicious requirement of §523(a)(6). At the hearing, counsel for Scarborough focused on the contention that this Court failed to recognize the distinction between the finding of an intentional act which results in harm to the other party versus the finding of an act done with the intent to do the harm to the other party. As she asserts, most tort cases involve some intentional act, and simply because the tortfeasor intended to take the action she took does not necessarily mean that the tortfeasor intended to harm the other person. Additionally, an intentional act which results in non-intentional harm to another person (a reckless act) may satisfy tort requirements, but may not satisfy the willful and malicious requirement of section 523(a)(6) because under section 523(a)(6), the debtor must have intended to harm the creditor by her actions. Cassidy v. Minihan, 794 F.2d 340 (8th Cir. 1986). [n 4]

Again, Scarborough concedes that her instituting the ex parte order of protection and her reporting the abuse to the police were intentional acts. However, she contends they were not done with the purpose of harming Fischer, but rather were intended to protect her child, and that any harm resulting to Fischer was simply an unintended result of her actions. At the least, she contends, the jury instructions and verdicts did not include a finding that she intended to harm Fischer, and so the issue should not be barred by collateral estoppel. Specifically, she contends that the language "acted primarily for a purpose other than bringing an offender to justice" does not necessarily involve a finding that she intended to harm Fischer, but rather could include a finding that she acted with another valid purpose, such as protecting her child.

Scarborough cites several cases to support her petition: Wheeler v. Laudani, 783 F.2d 610 (6th Cir. 1986); In re Miera, 926 F. 2d 741 (8th Cir. 1991); , 926 F. 2d 741 (8th Cir. 1991); Cassidy v. Minihan, 794 F.2d 340; and Geiger v. Kawaauhau (In re Geiger), 93 F.3d 443 (8th Cir. 1996). It is duly noted that Scarborough cited Geiger in her trial brief.

Wheeler v. Laudani, 783 F.2d 610, and In re Miera, 926 F.2d 741, are cited primarily to support Scarborough's point that in the Eighth Circuit, reckless conduct will not satisfy §523(a0(6). In In re Miera, 926 F.2d 741, the creditor, a court reporter, had received a judgment for actual and punitive damages in state court action for battery caused by the debtor, a

district judge, having kissed the creditor without his consent. Again, the Eighth Circuit repeated that recklessness would not satisfy §523(a)(6), and that in order for conduct to be malicious, it must not only be certain or almost certain to cause harm, it must also be targeted at the creditor. Id. at 744. The court held that the jury had found the debtor's conduct rose to the level of willful and malicious in that it was targeted at the creditor and was certain to cause him harm. The court held that both the actual damages and the punitive damages were nondischargeable since they both arose from the same willful and malicious injury. Id. at 745.

In Wheeler, 783 F.2d 610, a Sixth Circuit case, the creditor sought to have its judgment for libel declared nondischargeable under section 523(a0(6). In that case, the jury had awarded $345,000 on a general verdict in favor of the plaintiffs. The Sixth Circuit found summary judgment was not proper on the issue of dischargeability because the jury charge, which was based on the Michigan definition of malice for purposes of libel, included the alternatives that the debtor/author had published the statement either with knowledge of its falsity or in reckless disregard of whether it was false. Id. at 615. Therefore, the libel verdict on its face could have been based on reckless conduct. In other words, the Sixth Circuit held that there was a genuine issue of material fact as to whether the jury based its verdict upon a finding that the debtor recklessly disregarded the truth or upon a finding that he know his statements were false. Id.

This Court believes that Wheeler is distinguishable because in that case, the jury had the specific option of finding reckless disregard of whether the statement was false. Here, as discussed above, this Court believes the jury verdicts on malicious prosecution and abuse of process did not include within them a possible finding of recklessness, and so that issue need not be retried here.

In Cassidy v. Minihan, 794 F.2d 340, cited by Scarborough to illustrate the distinction between an intentional act which merely results in harm and an act done with the intend to harm, the creditor received a default judgment in a personal injury action for damages caused by the debtor's drunk driving. Th4 bankruptcy court had found the debt to be nondischargeable under section 523(a0(6) because it found that the debtor acted intentionally by deliberately ingesting alcohol and then driving his car on public roads in knowing disregard of the rights of others. [n 5] The district court reversed the bankruptcy court and the Eighth Circuit affirmed the district court, finding that although the debtor had intentionally consumed the alcohol and intentionally driven his car, he did not intend to harm the plaintiff by crashing into him, and thus, at most, his conduct reflected a reckless disregard for the risks involved in drinking and driving. Id. at 344. This did not satisfy the willful and malicious injury requirement of §523(a)(6). Id. [n 6]

This Court believes that Cassidy is distinguishable from the case at bar. In a drunk driving case, unless the plaintiff can

show that the defendant purposely crashed into him, the plaintiff cannot show that the defendant intended to harm him. The drunk driver, while he may consider the possibility that his condition may impair his ability to drive and result in an accident, he generally does not intend to wind up in an accident and injure someone. More likely, even if he appreciates the effect his alcohol consumption has on his ability to drive, he generally is hoping he makes it home without incident. As in Cassidy, the fact that an accident occurs with the other person is usually merely foreseeable as opposed to being certain or almost certain to result. Such actions are certainly not normally targeted at the victim. Furthermore, as the Eighth Circuit cited, even some cases in the drunk driving context have in fact indicated that while normally drunk driving judgments do not satisfy §523(a)(6), an exception may be made where there is a showing of specific intent to injure or where the surrounding circumstances are so egregious as to show intent to injure. Id. at 343 (citing In re Hostetler, 44 B.R. 886, 888 (M.D. Fla. 1984); In re Granberg, 39 B.R. 687, 689 (N. D. Ill 1984).

In contrast to the typical drunk driving case, in the case at bar, when Scarborough took the actions she did, there was only one possible intended victim (Fischer) and the consequences of taking her actions (denials of visitation, significant attorney fees, and criminal penalties) were obvious and were certain or almost certain to occur, and the Court believes that the jury found they were the desired result of her actions. Contrary to the situation in Cassidy where the outcome was merely

foreseeable but was unlikely to have been intended, the Court believes that the jury found Scarborough had to know that by taking the actions she did, it was certain or almost certain Fischer would be harmed in one way or another, and that was the reason the jury made the verdicts they did.

Scarborough also cites Geiger v. Kawaauhau (In re Geiger), 93 F.3d 443, which has been withdrawn by the Eighth Circuit so as to be heard en banc. In Geiger, the creditor had obtained a judgment for medical malpractice against the debtor because the debtor's malpractice resulted in the need for the plaintiff's legal to be amputated. The Eighth Circuit reversed the district court and the bankruptcy court who had ruled that the debt was nondischargeable under §523(a)(6). The bankruptcy court and district court had reasoned that in that particular case, the malpractice was so egregious that it constituted a willful and malicious injury.

The Eighth Circuit panel disagreed and held the debt to be dischargeable. Relying on Cassidy and Long, [n7], the Eighth Circuit found that the debtor's actions were merely reckless and were not performed with the intend of harming the plaintiff. Id. at 444. The Court said:

> The evidence showed only that Dr. Geiger failed to save Mrs. Kawaauhau's legal from the ravages of an infection, not that he intended to harm her. In other words, his efforts to treat Mrs. Kawaauhau were not calculated to result in the loss of her leg, and were therefore not malicious.

Id. Even assuming the Eighth Circuit en banc will agree with and uphold this decision in Geiger and the Cassidy-Long standard remains in the Eighth Circuit, this Court again finds that the circumstances in the case at bar to be distinguishable from the situation in Geiger.

In Geiger, the court came to the conclusion that the debtor's efforts were not calculated to result in the loss of the plaintiff's leg. Under the Cassidy-Long standard, this would not satisfy the willful and malicious requirement. In contrast, Scarborough's allegations against Fischer appear to have been calculated to result in his losing visitation, incurring attorney's fees, being subject to criminal prosecution, and experiencing significant distress, and again, this Court believes the jury so found.

Scarborough further asserts that the finding that she "acted for a purpose other than bringing an offender to justice," implies the jury may have found some other valid motive, such as protecting her child. The Court finds this assertion is simply not supported by the verdicts. Juries simply do not punish mothers (by awarding punitive damages) for attempting to protect their children, even where the mother was mistaken in believing her children were in danger. The Court finds the assertion that the jury awarded punitive damages when the believed Scarborough might have mistakenly thought she was protecting her child to be farfetched.

In sum, on the issue of nondischargeability of the actual damages portion of the state court judgment, the Court stands by its decision that the verdicts for the malicious prosecution and abuse of process included a finding of "willful and malicious" and not mere recklessness under §523(a0(6) and the awards of actual damages thereunder are therefore nondischargeable.

Next, Scarborough contends this Court should reconsider its previous ruling that the punitive damage award is nondischargeable. In the October 28 order, this Court found the punitive damages to be nondischargeable despite the fact that the punitive damage instruction contained language that the jury could award punitive damages if it found Scarborough's conduct to be "outrageous because of [her]evil motive or reckless indifference to the rights of others." This Court found that despite this language, the entire package of instructions and verdicts indicated that by awarding Fischer punitive damages, the jury found her conduct was particularly bad. Furthermore, the Court noted that when the Missouri Supreme Court enunciated the MAI punitive damage instruction, it specifically stated regarding the malice element that evil motive is to be inferred from the "reckless disregard" language.

On the other hand, as Scarborough's counsel pointed out at the hearing, this Court reluctantly came to a different conclusion in In re Ratcliff, 199 B.R. 185 (Bankr. W.D. Mo. 1996), and upon careful and extensive reconsideration, this Court has

decided that the conclusion in Ratcliff is the correct result under the existing state of the law. The Court still believes that punitive damages are awarded when the jury believes the defendant's conduct is especially bad and that it is unlikely that a jury will award punitive damages under a less-intentional standard than it awarded the actual damages. However, because the word "reckless" is included in the instruction, the Court feels constrained to declare the punitive damages awarded under such an instruction are dischargeable, and to that extent, this Court's October 28th order is modified.

Next, Scarborough asserts this Court failed to make its own independent finding of a legal injury, one of the elements of §523(a)(6). In the October 28 order, this Court found that the doctrine of collateral estoppel applied to that issue because the jury had awarded damages in the state court action. Scarborough maintains this was improper, essentially because she claims an award of damages is not the equivalent of a legal injury. Perhaps the Court misunderstands Scarborough's argument on this point, but it seems obvious to the Court that when the jury awarded actual and punitive damages, it must have found a legal injury. In fact, the verdict directors on both claims included the finding that Fischer "was thereby damaged" by Scarborough's actions.

The Court points out that a finding of nondischargeability under section 523(a)(6) is not restricted to cases of physical injury but also embraces economic injury as well. Adams v.

Zentz (In re Zentz), 157 B.R. 145, 148 (Bankr. W.D. Mo. 1993). On both actual damage awards, the jury clearly found economic and/or other injury. Regarding the punitive damages, one could argue that punitive damages are not designed to compensate for injury but rather are designed to punish the defendant, and therefore, a punitive damages award would not represent a finding of a legal injury. However, the Court simply notes that courts (including the Eighth Circuit) have frequently found punitive damages to be nondischargeable under §523(a)(6). See e.g. In re Miera, 926 F.2d at 745. In any event, because this Court has modified the October 28 ruling so that the punitive damages award is dischargeable, this "legal injury" argument on the punitive damages is moot.

Consequently, the Court finds nothing improper in its conclusion that by awarding damages to Fischer, the jury necessarily found a legal injury and so that issue is barred by the doctrine of collateral estoppel.

Scarborough then asserts this Court improperly excluded cross-examination of Fischer regarding his failing to show up for a lie detector test. She contends this is relevant to show that an investigation was conducted by the police department and that the decision to file charges against Fischer was not in Scarborough's hands. The Court finds Fischer's failure to take the scheduled lie detector test to be immaterial for at least two reasons. First, the issue as to Scarborough's responsibility in instigating the criminal proceedings is one of the very issues

that this Court has said the jury decided and this is an issue to which collateral estoppel applies. Furthermore, even if this Court were reconsidering actual evidence as to Scarborough's responsibility in causing the criminal prosecution, the Court specifically finds, without going into the law regarding the weight to be given to lie detector tests, that the fact that Fischer failed to take one to be unpersuasive under the circumstances.

Scarborough also requests that the Court specifically make separate findings of fact and conclusions of law so that the separate findings can be identified for purposes of appeal. She contends, "This was not done, and pursuant to Federal Rule 7052 of Bankruptcy Procedure and Rule 52 F.R.Civ.P., defendant is entitled to such separate findings. This Court did make findings of fact and conclusions of law in its October 28 order, and specifically stated at the close of that order that it constituted such findings and conclusions under Fed. R. Bankr. P. 7052. Scarborough did not specify which findings of fact were omitted from the order and the Court believes that all of its findings were included there. The Court points out that the ruling made in the October 28th order was that the jury's verdicts included the finding that Scarborough acted willfully and maliciously; this Court did not independently make the finding that she acted willfully and maliciously. By finding those issues are barred by the doctrine of collateral estoppel, this Court is specifically declining to make the individual evidentiary findings that the state court did regarding the circumstances surrounding Scarborough's actions.

CONCLUSION

For the foregoing reasons, Scarborough's request for a new trial is denied. Scarborough's motion to amend this Court's October 28, 1996, order to the extent that the punitive damage awarded was ordered to be nondischargeable in that order is GRANTED. The October 28, 1996 order is therefore modified to state that only the actual damages awards are nondischargeable under §523(a)(6); the punitive damages award is dischargeable. Scarborough's request for amendment of and addition to this Court's findings if denied for the reason that the Court believes it made appropriate findings and conclusions pursuant to Fed. R. Bankr. P. 7052 in both the October 28, 1996 order and in this order.

So ordered this 06 day of January 1997.

/s/ Frank W. Koger

Chief, Bankruptcy Judge.

BANKRUPTCY COURT FOOTNOTES

1. Although there is contrary authority on this rule in other circuits, see In re Limbaugh, 155 B.R. 952 - 960-61 (Bankr. N.D. Tex. 1993), the Eighth Circuit has held that to satisfy the willful and malicious requirement under §523(a)(6), recklessness is not enough and the defendant must have intended to harm the plaintiff. Cassidy v. Minihan, 794 F.2d 340 (8th Cir. 1986); In re Long, 774 F.2d 875, 880-81 (8th Cir. 1985); In re Miera, 926 F.2d 741 (8th Cir. 1991).

2. This language was contained in the malicious prosecution instruction.

3. This language was contained in the abuse of process instruction.

4. Again, other circuits have disagreed and held that intentional injuries resulting from intentional acts may be nondischargeable. See Norman W. Pressman and Teresa A. Generous, Norman W. Pressman and Teresa A. Generous, I may be Willful, But Am I Malicious? Norton Bankruptcy Law Advisor, (Dec. 1996) for a comparison of this circuit with the other circuits' interpretations of willful and malicious under §523(a)(6).

5. Because the plaintiff had received a default judgment in the state court personal injury action, the bankruptcy court was required to conduct a trial on the issues of willfulness and

malice because unlike the case at bar, no one had made any evidentiary findings so the issue could not have been barred by the doctrine of collateral estoppel.

6. Of course this result changed with the addition of §523(a)(9) which excepts debts for death or personal injury caused by the debtor's operation of a motor vehicle while intoxicated. See (In re Taneff), 172 B.R. 744, 747 (Bankr. W. D. N. Y. 1994), modified 190 B.R. 501 (W. D. N. Y. 1996). Willful and malicious were thus removed from the equation in the case of drunk driving judgments. Id.

7. The Eighth Circuit also noted in Geiger that its holding in In re Hartley, 874 F.2d 1254 (8th Cir. 1989)(en banc), was not intended to imply a change from the Cassidy-Long standard and had no precedential value.

UNITED STATES COURT OF APPEALS

FOR THE EIGHT CIRCUIT

No. 97-3788WMKC

Mark E. Fischer,	*	
Appellee,	*	**Order denying petition**
v.	*	**for Rehearing and**
Elisabeth Scarborough	*	**for Rehearing En Banc**
Appellant.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-01099)

May 18, 1999

Order entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

TITLE 11. BANKRUPTCY
CHAPTER 5. CREDITORS, THE DEBTOR, AND THE ESTATE
SUBCHAPTER II. DEBTOR'S DUTIES AND BENEFITS

11 USCS @ 523 (1999)

@ 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

* * * * * * * * * * * * * *

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

* * * * * * * * * * * * * * * *

INSTRUCTION NO. 7

If you find the issues in favor of plaintiff, and if you believe the conduct of defendant as submitted in either Instruction Number 9 or Instruction Number 12 was outrageous because of defendant's evil motive or reckless indifference to the rights of others, then in addition to any damages to which you find plaintiff entitled under either Instruction Number 9 or Instruction Number 12, you may award plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter defendant and others from like conduct.

Instruction No. 9

Your verdict must be for plaintiff if you belief:

First, defendant instigated a judicial proceeding against plaintiff which terminated in favor of plaintiff, and

Second, in so doing defendant acted primarily for a purpose other than that of bringing an offender to justice and acted without reasonable grounds, and

Third, plaintiff was thereby damaged.

Instruction No. 10

The term "instigated" as used in these instructions means that the defendant stimulated, promoted or encouraged the specific action taken.

Instruction No. 11

The phrase "reasonable grounds" as used in these instructions means the existence of facts which warrant an ordinarily cautious and prudent person in believing plaintiff Mark Fischer was guilty of the offense charged.

Instruction No. 13

Your verdict must be for plaintiff if you belief:

First, defendant made an illegal, improper, perverted use of process that was neither warranted nor authorized by the process, and

Second, the defendant had an improper purpose in exercising such illegal, improper or perverted use of process, and

Third, plaintiff was thereby damaged.

Instruction No. 14

The term "process" is used as a general term and denotes the means whereby a court compels a compliance with its demands.